STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 8, 2005
v	No. 257166 Macomb Circuit Court
FRANK KING, Defendant-Appellant.	LC No. 01-0002684-FH

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to eighteen years to forty years' imprisonment. We vacate and remand for entry of a judgment of conviction of breaking and entering without permission, MCL 750.115. The prosecution retains the option of vacating that conviction and seeking a new trial.

I

Defendant's conviction arose from events occurring on May 31, 2001, when defendant entered a St. Clair Shores home surreptitiously through a side door, while the elderly owner was outside in an adjacent lot. Once inside, defendant came face-to-face with the adult son who observed defendant approach the house. Defendant identified himself by an alias, indicating that he was looking for a nearby neighborhood household. Upon receiving directions, defendant returned to his vehicle and drove past the purported home he had indicated was his intended destination. At trial, to establish defendant's intent to commit a larceny inside the complainant's home, the prosecution submitted evidence from witnesses who, on July 3, 2001 and July 16, 2001, observed defendant similarly enter a St. Clair Shores and Eastpointe residence while the elderly homeowners were in the yard. In both instances, soon after defendant entered the home, he would leave and drive away. In the July 3, 2001 incident, defendant was confronted by the homeowner and defendant indicated that he was looking for another residence. At trial, it was undisputed that defendant did not have a weapon and did not commit a larceny inside the homes. Following deliberations, the jury convicted defendant as charged. This appeal ensued.

II

Defendant raises several claims of error, however, we find his claim of instructional error dispositive. Defendant argues the trial court committed reversible error when, over defendant's objection, it refused to instruct the jury regarding breaking and entering without permission as a necessarily included lesser offense of first-degree home invasion. The prosecution concedes this was error but argues the error was harmless because the evidence was sufficient to convict defendant of the greater offense. While we agree that the evidence was sufficient to convict defendant of the greater offense, nevertheless, we conclude that the error in failing to instruct the jury on the necessarily included lesser offense was not harmless.

Preserved claims of instructional error are reviewed de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). We review the instructions in their entirety to determine whether the instructions fairly presented the issues and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Preserved instructional error will not result in reversal on appeal ' "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative.' " *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The error must have, in other words, undermined the reliability of the verdict. *Cornell, supra* at 364.

An instruction on a lesser offense is required where " 'it is impossible to commit the greater offense without first having committed the lesser.' " *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001), quoting *People v Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975). The Supreme Court has held that breaking and entering without permission[1] is a necessarily included lesser offense of first-degree home invasion[2] and that "[i]t is impossible to commit . . .

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[1] Breaking and entering without permission requires (1) breaking and entering or (2) entering the building (3) without the owner's permission. MCL 750.115; *Silver, supra* at 392.

[2] The elements of first-degree home invasion are as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling. [MCL 750.110a(2); see also *Silver, supra* at 390.]

first-degree home invasion without first committing a breaking and entering without permission." *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002) (footnotes added); see *Cornell, supra* at 359. However, the "failure to instruct the jury regarding such a necessarily lesser included offense is error requiring reversal, and retrial with a properly instructed jury, [only] if, after reviewing the entire cause, the reviewing court is satisfied that the evidence presented at trial "clearly" supported the lesser included instruction." *Silver, supra* at 388 (citation omitted).

Here, we reject the prosecution's contention that the error was harmless. First-degree home invasion is a specific intent crime, requiring the prosecution to not only prove that the defendant did certain acts, but that he did the acts with the intent to cause a particular result. CJI2d 25.2c; see *People v Beaudin*, 417 Mich 570, 573-576; 339 NW2d 461 (1983). Thus, to obtain a conviction for first-degree home invasion, the prosecution was required to prove defendant had the specific intent to commit a larceny.[3] Conversely stated, if defendant's specific intent was not demonstrated or in doubt, and the jury was not instructed on an alternative offense, the failure to give the lesser included instruction cannot be deemed harmless. "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Silver, supra* at 393, quoting *Keeble v United States*, 412 US 205, 21-213; 36 L Ed 2d 844; 93 S Ct 1993 (1973).

In this case, the evidence showing defendant's efforts to avoid detection, his pattern of selecting homes and entering homes where elderly persons were outside working in their yards, and his act of driving past the household he purportedly was seeking was sufficient to permit an inference of defendant's intent to commit larceny. However, because the evidence presented at trial also "clearly" supported the requested instruction on the necessarily lesser included offense, the trial court committed reversible error in failing to give the instruction.

First-degree home invasion and breaking and entering without permission are distinguished by the intent to commit "a felony, larceny, or assault," once in the dwelling. *Silver, supra* at 392. (citation omitted). As explained in *Cornell, supra*:

> [A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. [*Cornell, supra* at 357.]

At trial, the only element in dispute was whether defendant possessed the requisite intent to commit larceny. Had the trial court instructed on the lesser offense, the jury could have rationally convicted defendant of that misdemeanor given no record evidence demonstrating that (1) defendant entered the home with any tools or items to transport stolen property, (2) defendant touched anything in the complainant's home, or (3) defendant rifled through the complainant's belongings. See e.g., *People v Palmer*, 42 Mich App 549, 551-552; 202 NW2d 536 (1972) ("A

[3] The felony information in this case specifically identified "larceny" as the underlying offense for the first-degree home invasion charge.

'presumption of an intent to steal does not arise solely from the proof of an breaking an entering.'")

Because the evidence in this case did not "tend only to prove the greater offense," *Cornell, supra* at 356, and because after reviewing the entire cause we conclude that it was more probable than not that the failure to provide the requested instruction undermined the reliability of the verdict, *Silver, supra* at 388, we reverse defendant's conviction of first-degree home invasion and remand for entry of judgment of conviction of breaking and entering without permission. The prosecution has the option of vacating that conviction and seeking a new trial in this case upon giving notification to the trial court before resentencing. *People v Gridiron*, 185 Mich App 395, 404; 185 NW2d 395 (1990), conviction vacated on rehearing on other grounds 190 Mich App 366 (1991), amended 439 Mich 880 (1991); *People v Newman*, 107 Mich App 535, 537-538; 309 NW2d 657 (1981). We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder